STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 27, 2006
v	No. 258671 Macomb Circuit Court
DAVID NATHANIEL HOLLOWAY, Defendant-Appellee.	LC No. 2004-000594-FC

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant David Holloway appeals as of right from his jury conviction of armed robbery[1] and possession of a firearm during the commission of a felony.[2] He was sentenced to 228 to 720 months' imprisonment for the armed robbery conviction and a consecutive two-year prison term for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

Holloway's convictions in this case arise from an August 9, 2003 robbery at a Wendy's restaurant in Detroit. He was separately charged with a November 3, 2003 robbery at the same Wendy's restaurant. The manager on duty during each offense was Urslia Holloway. At Holloway's request, the two offenses were tried together. At trial, Holloway admitted to participating in both offenses but claimed that the victim, Urslia Holloway, was a relative whom he met at a family reunion, that she later approached him with a plan to steal money from the restaurant, and that she was involved in both offenses. Therefore, Holloway argued, he could not be convicted of robbery against Urslia Holloway, because she was a willing participant. Urslia Holloway denied knowing Holloway before the offenses. With respect to the November 2003 offense, Holloway was convicted of armed robbery, conspiracy to commit armed robbery, carrying a concealed weapon, resisting or obstructing a police officer, and felony-firearm.

[1] MCL 750.529.

[2] MCL 750.227b.

The present appeal is taken only from Holloway's convictions arising from the August 2003 offense. Although some of Holloway's issues on appeal relate to his convictions arising from the November 2003 offense, he has not filed a claim of appeal from those convictions. Therefore, this Court does not have jurisdiction to consider any issues related to the November 2003 offense.

II. Joinder

A. Standard Of Review

Holloway first argues that he was denied a fair trial because he was made to stand trial on both the August and November 2003 cases at the same time. There is no merit to this issue. Two or more informations against a single defendant may be consolidated for a single trial.[3] And either party may move for joinder.[4] Before the trial began, defense counsel moved to join the trials of both offenses. The trial court questioned Holloway to ensure that he understood the motion and agreed with it, and he expressed his concurrence with his counsel's decision to join the two cases for trial. Because the offenses were joined for trial at defense counsel's request and Holloway expressly agreed with this decision, review of this issue is waived.[5]

Holloway also argues that defense counsel was ineffective for advising him to have the two offenses tried jointly. Because Holloway did not raise this issue in a motion for a new trial or a *Ginther*[6] hearing, this Court's review is limited to mistakes apparent from the record.[7] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."[8] To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different.[9] A defendant must overcome a strong presumption that his trial counsel's performance constituted sound trial strategy.[10]

B. Ineffective Assistance

The record discloses that defense counsel's decision to join the two offenses for trial, which Holloway expressly agreed with, was a matter of strategy. Among the reasons given by defense counsel for electing to have the two offenses tried together were that the defense

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[3] MCR 6.120(A).

[4] MCR 6.120(B).

[5] *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[7] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[8] *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

[9] *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

[10] *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

preferred to "make one go at it rather than two" and that a prosecutor's case "typically gets better" at a second trial of a similar offense. By trying the two cases together and advancing a defense in which Holloway admitted to participating in both offenses, each time in complicity with Urslia Holloway, Holloway had a tactical advantage by not giving the prosecutor an opportunity to call witnesses who could have rebuffed Holloway's claim that he attended a family reunion at which Urslia Holloway was present and that he was related to Urslia Holloway. Had Holloway been tried separately, the prosecution would have had the opportunity to more fully challenge these claims rather than rely principally on Urslia Holloway, who denied either knowing or being related to Holloway. We will not substitute our judgment in matters of trial strategy,[11] and the fact that a particular strategy does not work does not render counsel ineffective for using it.[12] Accordingly, we conclude that Holloway has not shown that he was denied the effective assistance of counsel.

III. Prosecutorial Misconduct

A. Standard Of Review

Holloway argues that he was denied a fair trial when the prosecutor inquired why the Moon brothers (two other Wendy's employees and Holloway's alleged nephews) were not at trial. Holloway asserts that the prosecutor's inquiry impermissibly shifted the burden of proof. We review de novo preserved claims of prosecutorial misconduct to determine if the defendant was denied a fair and impartial trial.[13] We review unpreserved claims for plain error affecting the defendant's substantial rights.[14]

B. The Prosecutor's Remarks

A prosecutor may not comment on a defendant's failure to testify or present evidence; such remarks might shift the burden of proof.[15] However, a prosecutor's comment on a defendant's failure to produce a witness who would support his defense does not shift the burden, but rather permissibly questions a defendant's credibility and highlights the weakness of the defense.[16]

Here, Holloway testified that he spoke to Urslia Holloway at a family reunion. But Urslia Holloway denied this, and Holloway presented no other evidence to support his testimony. The prosecutor's inquiry about the Moon brothers was intended to point out the weakness of the defense theory and to urge the jury to question Holloway's credibility. In this context, the remarks were not improper.

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[11] *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 382 (2004).

[12] *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996).

[13] *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

[14] *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

[15] *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

[16] *People v Fields*, 450 Mich 94, 112, 114; 538 NW2d 356 (1995).

Holloway also argues that the prosecutor impermissibly expanded the scope of the information when he asserted in his closing argument that other Wendy's employees present at the time of the robberies were also victims. Because Holloway did not object to the prosecutor's remarks at trial, we review this issue for plain error affecting Holloway's substantial rights.[17]

Holloway asserts that the prosecutor's statement constituted a constructive amendment of the information, allowing the jury to convict him of a crime for which he was not charged. However, Holloway cites no Michigan authority that recognizes such an action. At worst, the prosecutor's remarks misstated the law as applied to this case.

A prosecutor's clear misstatement of the law, which remains uncorrected, may deprive a defendant of a fair trial, but if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured.[18] Here, the jury received proper instructions that accurately reflected the armed robbery charge in the information. The jurors were also instructed that it was the trial court's duty to instruct them on the law and that if a lawyer said something different about the law, they had to follow the court's instructions. Jurors are presumed to follow their instructions.[19]

The fact that the jury sent a note to the trial court during deliberations asking whom the armed robbery charge was against does not indicate that it convicted Holloway of a crime for which he was not charged. The jury reached a verdict before it received an answer and informed the trial court that it did not need the answer; it had resolved the question on its own. Because the jury had a copy of the instructions that named Urslia Holloway as the only robbery victim, we can presume that it followed those instructions. For these reasons, Holloway has not shown that his substantial rights were affected by the prosecutor's misstatement, and defense counsel was not ineffective for failing to object.

IV. Holloway's Theory Of The Case

A. Standard Of Review

Holloway argues that the trial court's failure to give a lesser offense instruction and a cautionary accomplice instruction requires reversal. Holloway contends that the instructions would have allowed the jury to accept his version of events. Because Holloway did not request either a cautionary instruction on accomplice testimony, a lesser offense instruction on conspiracy to embezzle, or an instruction on his theory of defense, or object to the trial court's failure to give these instructions, this issue is not preserved.[20] Therefore, our review is limited to plain error affecting Holloway's substantial rights.[21]

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[17] *Gonzalez, supra* at 643.

[18] *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

[19] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[20] *Gonzalez, supra* at 642-643.

[21] *Id*. at 643.

B. Lesser-Included Offense

Holloway appears to argue that conspiracy to embezzle is a lesser-included offense of armed robbery. Only instructions on necessarily included lesser offenses are proper.[22] A necessarily included lesser offense has all of its elements encompassed in the greater offense.[23] The elements of embezzlement are (1) the money in question belonged to the principal, (2) the defendant had a relationship of trust with the principal as an agent or employee, (3) the money came into the defendant's possession due to the relationship of trust, (4) the defendant dishonestly converted the money to his own use, (5) the act was without the consent of the principal, and (6) at the time of the conversion, the defendant intended to defraud or cheat the principal.[24] These elements are not subsumed in the offense of armed robbery, which requires (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a specified weapon or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon.[25] Therefore, we conclude that the trial court did not err when it failed to instruct on conspiracy to embezzle. Further, because the instruction was not warranted, defense counsel was not ineffective for failing to request it.[26]

C. Accomplice Testimony

Holloway also argues that the trial court should have sua sponte given a cautionary instruction on accomplice testimony, which would have allowed the jury to properly analyze Urslia Holloway's testimony. In *People v Young*,[27] the Michigan Supreme Court rejected a rule of automatic reversal announced in *People v McCoy*,[28] when a trial court erroneously fails to give a cautionary accomplice instruction on request. The Court also rejected the *McCoy* rule permitting reversal in the absence of a defense request if the issue of guilt is "closely drawn."[29] Now, absent a request, a defendant's claim may only be reviewed for plain error.[30]

Absent a request, failure to give a cautionary accomplice testimony instruction does not require reversal when potential problems with an accomplice's credibility have been plainly presented to the jury.[31] Here, defense counsel cross-examined Urslia Holloway regarding her

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[22] *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

[23] *Id*.

[24] *People v Collins*, 239 Mich App 125, 131; 607 NW2d 760 (1999).

[25] MCL 750.529.

[26] *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002) (defense counsel is not required to make a futile objection).

[27] *People v Young*, 472 Mich 130, 142; 693 NW2d 801 (2005).

[28] *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974).

[29] *Young*, *supra* at 142-143.

[30] *Id*. at 143.

[31] *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996).

relationship to Holloway and the consequences of embezzlement. And he vigorously questioned Urslia Holloway's credibility in his closing argument. Therefore, reversal is not required. Holloway's assertion that the jury was left without a means of accepting his version of events is incorrect. The jury was instructed on the elements of armed robbery. If the jury had believed Urslia Holloway was involved, it would not have convicted him of armed robbery.

V. Other Ineffective Assistance Of Counsel Claims

In a supplemental pro se brief, Holloway argues that defense counsel was ineffective for failing to call Patricia Carson as a witness. Defense counsel intended to call Carson, at Holloway's request, but stated during trial that she could not be located. Although Holloway asserts in an affidavit that Carson was present throughout the trial seated next to his sister, he failed to present an affidavit from Carson. Further, it is not apparent from the record what testimony Carson could have provided. Therefore, Holloway has failed to demonstrate that defense counsel's failure to call Carson deprived him of the effective assistance of counsel.

Holloway also argues that defense counsel was ineffective for failing to request a cautionary instruction to the effect that evidence of Holloway's past convictions could not be considered as substantive evidence. A witness's past conviction for a crime involving dishonesty or theft may be used for impeachment.[32] Here, Holloway has not overcome a presumption that defense counsel declined to request a cautionary instruction as a matter of strategy because he did not want to highlight Holloway's convictions any more by requesting an instruction that referred to the prior convictions. Furthermore, it is apparent from the record that the prosecutor narrowly focused his questions and closing argument, asserting that Holloway's past armed robbery conviction gave him a reason to lie due to his parole status at the time of the instant offenses. The prosecutor never attempted to use the conviction for an improper purpose; rather, he only attacked Holloway's credibility. Thus, Holloway was not prejudiced by the absence of a cautionary instruction.

VI. Sentencing Credit

Holloway asserts that he is entitled to sentence credit for the 11 months he was in jail between his arrest and sentencing. When Holloway was arrested, he was on parole for a prior armed robbery conviction. Holloway acknowledges that he is entitled to sentence credit for time served on the remaining portion of his sentence for the paroled offense.[33] But he asserts that because he already served the mandatory minimum sentence for his paroled offense, MCL 769.11b requires that his time served be credited on the instant offense. We disagree.

In *People v Seiders*, this Court held that MCL 769.11b is inapplicable to a defendant who is in jail on a parole detainer.[34] "A defendant is only entitled to a sentencing credit under MCL

[32] MRE 609.

[33] *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

[34] *Id*. at 706-707.

769.11b if he has been '*denied or unable to furnish bond*.'"[35] "[B]ond is neither set nor denied when a defendant is held in jail on a parole detainer."[36] Therefore, if Holloway was not required to serve additional time on his previous armed robbery sentence because of the parole violation, then the time served is essentially forfeited. If Holloway was required to serve additional time on his paroled offense and believes he was incorrectly denied credit toward that sentence, he may seek relief from that sentence. But relief is not available in this case.

We affirm.

/s/ William C. Whitbeck
/s/ Alton T. Davis

[35] *Id*. at 707, quoting MCL 769.11b (emphasis in original).

[36] *Id*.